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# Polish Constitutional Tribunal Judgments with “Deferral Clause” and Their Application by Polish Courts

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The main aim of this paper<sup>1</sup> is to present the specificity of functioning of the Polish Constitutional Tribunal, the characteristics of one type of its judgments, i.e. verdicts with a “deferral clause” and preparation of the *de lege lata* and *de lege ferenda* postulates. Problems analyzed in this work remain valid in both jurisprudence and legal doctrine.

**Keywords:** Polish Constitutional Tribunal, judgments of the Constitutional Tribunal, execution of judgments of the Constitutional Tribunal, constitutional law, judiciary.

## Lenkijos Konstitucinio teismo nutarimai su atidėjimo nuostata ir jų taikymas Lenkijos teismuose

Pagrindinis šio straipsnio tikslas yra Lenkijos Konstitucinio teismo ypatumų bei vienos šios institucijos nutarimų rūšies, t. y. nutarimų su atidėjimo nuostata, būdingų savybių pristatymas ir *de lege lata* bei *de lege ferenda* postulatų rengimas. Šiame straipsnyje analizuojami klausimai yra aktualūs tiek teismų praktikai, tiek teisės doktrinai.

**Pagrindiniai žodžiai:** Lenkijos Konstitucinis teismas, Konstitucinio teismo nutarimai, Konstitucinio teismo nutarimų vykdymas, konstitucinė teisė, teismo institucijos.

## Introduction

The Constitutional Tribunal in Poland (thereinafter “the CT”), alongside the State Tribunal and courts, is a part of judicial authority. This power is independent of the legislature and the executive. The Polish Constitutional Tribunal was created by virtue of an amendment to the Constitution of the Polish People’s Republic, made in 1982, and by the Act of 29 April 1985 (Winczorek, 2008, p. 361). This body began

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functioning in 1986. The CT is composed of 15 judges chosen individually by the Sejm (one of the chambers of the Polish Parliament) for a term of office of 9 years amongst persons distinguished by their in-depth knowledge of the law. Its system and operating rules are currently specified in two acts: the Act of 30 November 2016 on the organization and procedure before the Constitutional Tribunal and the Act of 30 November 2016 on the status of judges of the Constitutional Tribunal.

The CT is not a court of fact because it is a court of law. According to Article 188 of the Constitution of the Republic of Poland (The Constitution of the Republic of Poland of 2 April 1997 – thereafter “the Constitution”), the Constitutional Tribunal adjudicates in the following matters: the conformity of statutes and international agreements to the Constitution, the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute, the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes, the conformity of the purposes or activities of political parties to the Constitution, and complaints concerning constitutional infringements.

The main aim of this paper is to present the specificity of functioning of the Polish Constitutional Tribunal, the characteristics of one type of its judgments, i.e. verdicts with a “deferral clause” and preparation of the *de lege lata* and *de lege ferenda* postulates. Problems analyzed in this work remain valid in both jurisprudence and legal doctrine. First of all, this article shows various reactions of Polish courts to such verdicts and difficulties related to the execution thereof. The analysis of this issue is very important due to its relationship with the problem of presumption of constitutionality and resumption of proceedings after the CT ruling confirming unconstitutionality of a given regulation.

## 1. Characteristics of the Polish Constitutional Tribunal judgments involving the application of a “deferral clause”

The Constitutional Tribunal verdicts are universally binding and final. The universally binding force of verdicts means that they bind all legal entities, including public authorities. The judgment may refer to reviewing the constitutionality of certain legal provisions or the entire normative act. It depends on the content of the complaint or application initiating the proceedings. The finality of the Constitutional Tribunal rulings means that they cannot be appealed to any authority, including the CT. Thus, the proceeding before the CT is single-stage.

One of the types of the CT verdicts are judgments with a “deferral clause”. According to Article 190(3) of the Constitution of the Republic of Poland, as a general rule, the CT verdicts shall enter into force on the day of their publication in the relevant official gazettes. However, the Constitution of the Republic of Poland provides the CT with special powers in this regard, i.e. determining an alternative date for the loss of binding force of a normative act. This concept was adapted from the Austrian legal system (Freitag, 2016, p. 186; Florczak-Wątor, p. 119). The time for which it is possible to postpone an entry into force of a CT verdict may vary. In relation to acts, it amounts to 18 months, while in the case of other normative acts (including international agreements) – a maximum of 12 months. Where the CT verdict has financial consequences not provided for in the budget, the Constitutional Tribunal have to specify the date for the end of the binding force of the normative act in question, after seeking the opinion of the Council of Ministers. According to Witold Płowiec’s research, the CT usually decides to postpone the loss of binding force of a regulation for a period of more than 6 and less than 12 months. In the years 1998–2014, the Constitutional Tribunal applied postponement for this period (from 6 to 12 months) in 112 verdicts, from 12 to 18 months in 27 verdicts, from 1 to 6 months in 18 verdicts, less than a month in 1 verdict (Płowiec, 2017, p. 323).

Removing an unconstitutional regulation from the legal system does not always lead to the achievement of the goal set by the Constitutional Tribunal. Significant values could sometimes be severely harmed if the adjustment was immediately removed from the applicable legal system to such an extent that the effects of the harm would outweigh the benefits of the removal (Matczak *et al.*, 2007, p. 272; Parchomiuk, p. 111). Therefore, the main aim of the CT postponing the loss of binding force of unconstitutional legal regulations is enabling the relevant authority to amend the provisions to make them consistent with the Constitution or another superior act (Jackowski, 2013, p. 310). A regulation declared unconstitutional by virtue of such a ruling loses the presumption of constitutionality as soon as the verdict is announced in the courtroom, but it loses its binding force at a later date – indicated in the operative part of that ruling (Florczak-Wątor, 2013, p. 114).

The CT sometimes indicates the entity who requested to defer the loss of a binding force of the verified regulation in order to justify its verdict. In addition, the CT indicates the main reasons included in the application for a “deferral clause”. These reasons were, for example: the creation of a loophole in the law (Judgement of the CT of 20 May 2003; Judgement of the CT of 29 May 2002), Poland’s international obligations (e.g. Judgement of the CT of 31 March 2009), disruption of the implementation of the state budget (e.g. Judgement of the CT of 8 April 2014), advancement of legislative work aimed at changing a legal regulation (e.g. Judgement of the CT of 4 November 2006), protection of persons exercising the given rights (e.g. Judgement of the CT of 19 July 2011), and enabling adjustments of the law to constitutional regulations (e.g. Judgement of the CT of 18 May 2005).

On May 19, 1998, the Constitutional Tribunal issued its first judgment with a “deferral clause” (Freitag, 2016, p. 186). Since that time and until the end of 2017, the CT issued 169 such verdicts. In the 1998–2017 period, the Constitutional Tribunal issued the most verdicts with a “deferral clause” in 2014 (17 verdicts), and the least in 2017 (1 verdict) (Annex 4. Types of decisions contained in judgments, 2018, p. 85–86)<sup>2</sup>.

## 2. The obligation to apply an unconstitutional regulation during the deferral period by the courts

The issuing by the Constitutional Tribunal of a judgment with a “deferral clause,” deferring the loss of force of a universally binding unconstitutional regulation leads to effects extended over time. First, the judgment gains universally binding force and non-appealability upon being announced verbally in court. Second, since the announcement of the judgment with a “deferral clause” in the relevant publisher, the deadline for the loss of force of universally binding unconstitutional regulation has been ongoing. Third, once the deadline set by the Constitutional Tribunal has expired, non-constitutional regulation will be eliminated from the legal system if the legislator does not change it earlier (Ziółkowski, 2012, p. 20; Płowiec, 2017, p. 116).

Two basic views emerged in the field of constitutional assessment of law by courts. According to this first view, the court is obligated to apply non-constitutional regulations during the deferral period. Proponents of this concept believe that an unconstitutional provision should be applied absolutely because it is in force by a judgment of the Constitutional Tribunal (e.g. Judgement of the SC of 20 April 2011; Judgement of the CT of 22 September 2015; Czeszejko-Sochacki, 2000). According to

<sup>2</sup> The detailed number of judgments of the Constitutional Tribunal with a “deferral clause” in particular years: 1998 – 2, 1999 – 5, 2000 – 7, 2001 – 4, 2002 – 8, 2003 – 6, 2004 – 13, 2005 – 14, 2006 – 14, 2007 – 9, 2008 – 8, 2009 – 7, 2010 – 11, 2011 – 6, 2012 – 9, 2013 – 16, 2014 – 17, 2015 – 10, 2016 – 2, 2017 – 1.

the second approach, the court may refuse to apply unconstitutional provisions during the deferment of the loss of force of the unconstitutional regulation in force (e.g. Gonera, Łętowska, 2008, p. 3; Hauser, Trzeciński, 2008, p. 85–86; Wiącek, 2008, p. 234–235). Andrzej Wróbel believes that the logic of applying law collides with the act of forcing the court to apply a provision which was found unconstitutional by a ruling of the Constitutional Tribunal, even if the CT postponed the loss of its binding force (Wróbel, 2007, p. 120).

The judicial decisions of the Supreme Court (thereinafter “the SC”) are dominated by the view that the deferment of the loss of binding force of an unconstitutional regulation is an example of the exclusion of the *ex tunc* effectiveness of the Constitutional Tribunal’s judgment (Judgement of the SC of 20 April 2011). According to the Supreme Court, determining a later date of expiry for binding force of a normative act is leaving it in the legal order for a definite period of time. The CT, acting within the constraints of its competences, despite the statement of non-compliance with higher-order regulations, maintains the legal norm (Judgement of the SC of 28 March 2000; Resolution of the S.C. of 3 July 2003; Judgement of the SC of 9 October 2003; Resolution of the SC of 23 January 2004; Judgement of the SC of 19 February 2004; Resolution of the SC of 23 July 2005; Judgement of the SC of 20 April 2006; Judgement of the SC of 16 April 2008).

The Supreme Court’s position has been confirmed by its reaction to the Constitutional Tribunal’s judgment of 12 January 2000. The SC initiated a proceeding before the CT with a legal question regarding the constitutionality of Article 56(2) of the Act of 2 July 1994 on rental of residential premises and housing allowances. The Constitutional Tribunal confirmed the unconstitutionality of the contested regulation and postponed the loss of its binding force on 11 July 2001. The SC issued a judgment ending the proceedings, in which the abovementioned legal question was brought forth, and found that it was obligated to apply an unconstitutional provision which was still in force (Judgement of the SC of 28 March 2000; Florczak-Wątor, 2006, p. 191). The Supreme Court stated in the legal justification of its judgment that “The Supreme Court is bound by the above-mentioned judgment of the Constitutional Tribunal, also to the extent that this judgment determined, that the unconstitutional Article 56(2) of the Act on rental of residential premises and housing allowances will expire only on 11 July 2001” (Judgement of the SC of 28 March 2000).

For a long time, the SC emphasized an absolute obligation to apply the provision throughout the deferral period, but then this position was gradually liberalized (Freitag, 2016, p. 190). Currently, the prevailing view that best reflects the thesis of the Supreme Court judgement of 27 August 2015: “recognition of the provision as unconstitutional and deferring the loss of its binding force does not lead to an automatic prohibition or order to apply it during the deferral period, but each time it requires an individual decision” (Decision of the SC of 27 September 2015). According to the SC, the obligation to apply a legal norm recognized by the CT as unconstitutional shall be accepted as a rule throughout the postponement of the derogatory effect. However, it is necessary to search for variants of this norm in line with the direction set out in the Constitutional Tribunal’s ruling (Decision of the SC of 18 January 2017). There may even be cases in which the reason for postponing the derogatory effect of an unconstitutional legal norm is so important that it practically excludes the possibility of omitting such a norm in the resolution of a particular case. It depends on the rank of constitutional values, because of which the Constitutional Tribunal deemed it necessary to postpone the derogatory effect (Resolution of the SC of 27 March 2014).

Adoption of the prospective effect of Tribunal verdicts by the SC also applies to Article 190(4) of the Constitution (possibility of constitutional restitution) (Bosek, Wild, 2014, p. 211). If the unconstitutional regulation is applied during the deferral period, it is not correct to state that the rulings issued on its

basis may be changed in the renewal process. Therefore, reopening of proceedings in cases completed before the entry of the Constitutional Tribunal's ruling into force is unacceptable (Judgement of the SC of 20 April 2011). According to the SC, it is difficult to accept a situation in which the act of applying the law could, after the eventual loss of its binding force, be revoked by resuming the proceedings. This leads to the conclusion that if a judgment is postponed, it is also not possible to resume the proceedings later (Judgement of the SC of 20 April 2006).

In legal literature and in the jurisprudence of the Supreme Administrative Court, a standpoint of approval towards the application of unconstitutional provisions during the deferral period is encountered more and more often, despite the deferral clause being included in it. The Supreme Administrative Court (hereinafter "the SAC") considers a provision recognized by the Constitutional Tribunal as unconstitutional to having been of such nature from the very beginning, i.e. from the day of its entry into force. This fact must be taken into account when reviewing an administrative act taken on the basis of an unconstitutional provision (Judgement of the SAC of 6 February 2008. The admissibility of refusing to apply unconstitutional regulation during the deferral period was indicated in, e.g., Judgement of the SAC of 23 February 2006; Judgement of the SAC of 15 July 2009; Judgment of the SAC of 14 March 2017; Judgment of the SAC of 5 December 2017; Judgement of the Provincial Administrative Court (hereinafter "the PAC") in Kraków of 11 December 2008; Judgement of the PAC in Krakow of 22 September 2009; Judgement of the PAC in Poznań of 17 June 2015; Judgement of the PAC in Wrocław of 10 December 2009). According to the SAC "In such case, one should take into account the subject of the regulation covered by the unconstitutional provision, the reasons for the violation and the significance of constitutional values violated by such provision" (Judgement of the SAC of 5 May 2009). Said position originates from the rule contained in Article 190(1) of the Constitution, which states that CT rulings have universally binding force and usually, in accordance with Article 190(3) sentence 1, that CT judgments come into force on the day of their publication, and moreover, from the thesis that the fact that a given provision, although unconstitutional, is still in force does not mean that there is an absolute obligation to apply it.

An example of the most common reaction of administrative courts to judgments with a deferral clause is the reaction of the SAC to the verdict of the CT of 10 December 2002. The CT stated that some provisions of the regulation of the Council of Ministers of 27 June 2000 on detailed rules for the introduction of parking fees for motor vehicles on public roads were unconstitutional. This proceeding was initiated by two legal questions of the Supreme Administrative Court. The Constitutional Tribunal postponed the loss of binding force of unconstitutional provisions. These provisions were to expire on 30 November 2003. The SAC ruled that in a case that was the subject of a legal question, the Constitutional Tribunal's judgment may be applied upon its announcement, despite of its deferment (Judgement of the SAC of 25 June 2003; Hauser, 2002, p. C2; Florczak-Wątor, 2013, p. 115–116). The SAC relied on the objectives, functions and internal logic of these institutions.

In its initial justifications, the Constitutional Tribunal has not included guidelines on how to apply its rulings with the deferral clause at all (Florczak-Wątor, 2013, p. 115). However, after the discrepancy in judicial decisions regarding the application of the unconstitutional provision during the deferral period became clear, the CT presented its view on this issue. According to this view, throughout the period of postponement of loss of binding force of an unconstitutional regulation, courts and other state organs must strictly apply this provision (this view was presented in numerous judgements of the Constitutional Tribunal, e.g.: Judgement of the CT of 2 July 2003; Judgement of the CT of 27 April 2005; Judgement of the CT of 1 December 2010; Judgement of the CT of 12 December 2011).

This view of the CT was expressed for the first time in its judgment of 2 July 2003. In the judgement of 2 July 2003, the CT stated the unconstitutionality of the provisions of the Code of Civil Procedure on 17 November 1964, which did not provide for reimbursement of the costs of proceedings by the President of the Office of Competition and Consumer Protection, the President of Energy Regulation Office, the President of the Telecommunications Regulation Office and the President of the Office of Rail Transport, and in proceedings before the Antimonopoly Court. The Constitutional Tribunal stated that “[t]he possibility of determining the date of expiry of the binding force of an unconstitutional provision of an act by the Constitutional Tribunal, later than the day of announcement of the judgment of the Constitutional Tribunal in the Journal of Laws of the Republic of Poland, has a clear and undoubted basis in Article 190(3) of the Constitution. If the Constitutional Tribunal makes use of this possibility, within the time limit indicated by the Tribunal, the provision declared unconstitutional retains its binding force and therefore it must be observed and applied by all its addressees. According to Article 190(1) of the Constitution, this decision contained in the text of the decision of the Constitutional Tribunal is not only final but also universally binding. The scope of this power covers all the courts as well, since the Constitution does not provide for any exception to the principle expressed in its Article 190(1)”.

In more recent jurisprudence, the Constitutional Tribunal sometimes partially modifies its radical position. An example is the judgment of the full composition of the CT of 11 May 2007 (similarly: Judgement of the CT of 16 February 2010). In that judgment, the Constitutional Tribunal stated that “all authorities applying the law should – within the limits of their competences and skills, due to the wording of Article 7 and Article 8 of the Constitution – to counteract the consolidation of the unconstitutional state, and not to passively wait for the final removal from the legal circulation of an act the unconstitutionality of which has already been found” (Judgement of the CT of 11 May 2007).

### **3. The unique possibility of refusing to apply the unconstitutional regulation by the courts**

The admissibility of not applying the unconstitutional norm during the deferral period in all cases undermines the sense of the deferral. Furthermore, such non-application could lead to an unjustified differentiation of the legal situation of a specific legal norm addressee (Mączyński, Podkowik, 2016, p. 34). Therefore, it is a rule that during the deferral period all courts are obliged to apply unconstitutional regulations. There are two justified exceptions to this rule, which will be briefly characterized.

Firstly, the courts may omit application of the unconstitutional norm during the deferral period when a “benefit privilege” is granted in the case by the CT. This is a kind of gratification for activity of the entity which initiated the process that led to the unconstitutionality of the defective normative act. The “benefit privilege” enables the applicant to change the act of applying the law (administrative decision, court decision or other decision) during the postponement of the loss of binding force of the unconstitutional provision in relation to which he or she lodged a constitutional complaint (Florczak-Wątor, 2012, p. 29). The complainant may exercise this right before the deferral date, i.e. faster than other entities. For the first time, the “benefit privilege” in a case initiated by a constitutional complaint was applied in the judgment of the Constitutional Tribunal of 18 May 2004. This judgment concerned a norm depriving the injured party of the right to participate in the proceedings on annulment of the penalty notice. The Constitutional Tribunal ruled that this regulation did not comply with the right to a court (Article 45(1) of the Constitution). The CT postponed the term of the binding force of the defective regulation and stated in the operative part of that judgment that “the deferral of the termination of the binding force of this provision shall not prevent the applicants’ rights referred to in Article 190(4) of the Constitution, in the case being the basis of this proceeding”.



The “benefit privilege” was also granted by the Constitutional Tribunal to courts which submitted a legal question, which enabled them to bypass this provision during the deferral. An example of a ruling in which the constitutional court applied the “benefit privilege” in the justification of a ruling issued in a case initiated by a court’s legal question is the judgment of 23 October 2007. The legal question concerned the constitutionality of depriving men of the right to earlier retirement to the same extent as women. The CT has found that the controlled regulation is inconsistent with Article 32 (the principle of citizens’ equality before the law) and 33 (the principle of equality between women and men) of the Constitution and postponed the loss of its binding force for 12 months. In addition, the CT found that “[t]he postponement date does not, however, preclude the exclusion of its effect from the case which gave rise to the proceedings before the Constitutional Tribunal. <...> For the court before which proceedings are pending in the case which gave rise to the legal question, it is important that to announce the judgement in the courtroom. Along with it, the presumption of constitutionality, which is attributed to every legal act issued by the legislator, is waived. This fact is not without significance for the proceedings pending before the court which formulated the legal question”.

Although the “benefit privilege” indicated by the Constitutional Tribunal in the justification of the decision issued in the proceedings initiated by a legal question is not binding in indicating the possibility of omitting the provision during the deferral, it is however taken into account by the courts that judge in the cases to which CT’s judgment applies (Judgement of the District Court (thereinafter “the DC”) in Wejherowo of 2 October 2006; Judgement of the PAC in Gdańsk of 18 December 2008). The courts also respect the rulings of the Constitutional Tribunal containing in the operative part the “benefit privilege” issued in cases initiated by a constitutional complaint and allow the applicants to resume, during the postponement in cases in which the legal basis of the decision was unconstitutional (Judgement of the SC of 9 March 2005).

“Benefit privilege” is an accepted way of making an exception from the rule of deferral. However, legal dilemmas arise when the CT takes a constitutional complaint into account and defers the loss of binding force of a non-constitutional regulation, but the CT does not mention about the granting of the “benefit privilege”. Is it possible to refuse applying the unconstitutional provision in such a situation? The Supreme Court took a position on this issue in its judgment of 20 April 2011 (similarly: Judgement of the SC of 16 April 2008). The SC found that “The judgment of the Constitutional Tribunal, postponing the loss of binding force of a provision found to be unconstitutional, does not constitute grounds for resumption of the proceedings provided for in Article 401<sup>1</sup> of the Code of Civil Procedure, unless its sentence states an individual benefit for the person who lodged the constitutional complaint”.

Secondly, there is a dominant view in legal doctrine that if the subject of the review is a sub-statutory regulation, then the courts may settle the cases bypassing the provision found to be inconsistent with hierarchically higher legal norms (Podkowik, 2019, p. 60; Garlicki, 2016, p. 15). This entitlement is derived from Article 178(1) of the Constitution, according to which judges are only subject to the constitution and statutes. This thesis is also supported by the direct application of the Constitution by courts (Article 8(2) of the Constitution) and the control of the activity of public administration by administrative courts (Article 184 of the Constitution) (Florczak-Wątor, 2013, p. 125).

There is also a view in legal doctrine against the admissibility of the court omitting the sub-statutory provisions, according to which the court has no competence base for such an action (Wiącek, 2011, p. 275). Article 178(1) of the Constitution is a guarantee provision for a judge, but as Jan Podkowik rightly points out, the guarantee would not make sense if the court had to apply the sub-statutory act (Podkowik, 2019, p. 60). For this reason, courts may disregard unconstitutional provisions within sub-statutory acts. Sometimes, however, it would be more beneficial for the legal system to present a legal

question to the Constitutional Tribunal and remove an unconstitutional act from this system for good.

However, the admissibility of the review of the constitutionality of sub-statutory acts by courts as an instance of their discretion is not questioned in the judicial decisions of the Constitutional Tribunal, the Supreme Administrative Court and the Supreme Court (Judgement of the CT of 13 January 1998; Judgement of the CT of 16 February 2010; Judgement of the SC of 23 April 2009; Resolution of the SAC of 21 February 2000; Judgement of the SAC of 23 February 2006). In the judgment of 13 January 1998, the Constitutional Tribunal noted that despite repealing the challenged legal provision, there could still be practical cases of its continued application. However, the Tribunal recognized that due to the sub-statutory status of the unconstitutional provision, an assessment of its constitutionality and legality may be made by the courts considering individual cases in which the provision could be applied.

The Supreme Administrative Court, in its judgment of 23 February 2006, explicitly stated that “[t]he court may refuse to apply a provision of an unconstitutional ordinance also during the period of postponement of the loss of binding force of that provision adjudicated by the judgment of the Constitutional Tribunal”.

With a judgment of 23 April 2009, the Supreme Court decided the case No. IV CNP 99/8. The basic issue was to assess whether, despite the ruling of the Constitutional Tribunal declaring the provision of the rank of the ordinance to be incompatible with the act and the Constitution, and postponement of its binding force, the common court retained the right to refuse to apply its provisions in the case being resolved. According to the SC, “this kind of a Constitutional Tribunal ruling does not affect the competence of a common court, derived from the wording of Article 178 of the Constitution. The justification for the powers of common courts is the constitutional principle of being bound only by statutes. Therefore, the judgment of the Constitutional Tribunal regarding a lower-order normative act should not affect the limitation of the competence of a common court in this respect”.

## Conclusion and postulates

To sum up, the jurisprudence of the Supreme Court is dominated by the view that courts should apply unconstitutional provisions during the deferral period, but at the same time exceptions are possible.

The Constitutional Tribunal believes that generally unconstitutional regulations should be applied during the deferral period. However, the courts may omit them when they are sub-statutory and when a “benefit privilege” is granted in the case by the CT.

Moreover, administrative courts usually share the view of the Supreme Administrative Court in their judicial decisions, which believes that various circumstances should be taken into account to determine whether the courts should apply an unconstitutional provision during the postponement period in a particular case or omit this provision on the legal basis of adjudication. The circumstances requiring further consideration include e.g.: the subject of the regulation covered by the unconstitutional provision, the reasons for the violation and the significance of the constitutional values violated by such a provision, the reasons why the CT has postponed the expiry of the binding force of the unconstitutional provision, the circumstances of the case heard by the court and the consequences of applying or refusal to apply an unconstitutional provision.

The issuing of rulings with “deferral clause” by the Constitutional Tribunal implies numerous problems in the sphere of applying the law, mainly due to the lack of comprehensive regulation under the provisions of the Constitution in this respect. There are no directives addressed to bodies applying the law regarding whether to apply the unconstitutional provision during the deferral period to pending cases or not, as well as cases that will arise during the deferral period. The consequences of deficiencies



in regulations regarding judgments with a “deferral clause” are e.g. inconsistent judicial decisions of the Constitutional Tribunal and the Supreme Court as well as doubts expressed by courts in the cases of executing rulings with a “deferral clause”. Therefore, it is reasonable to consider several solutions that may facilitate the courts to refer to the Constitutional Tribunal’s rulings with “deferral clause”.

The first of *de lege ferenda* postulates is the introduction of a legal basis that would allow courts to suspend proceedings pending postponement. This would be possible provided that an important business would not interfere. Perhaps at this time the legislator will manage to change the unconstitutional norm before it losing its binding force and creating a legal loophole. According to Katarzyna Gonera and Ewa Łętowska, such a solution would allow the courts to adjudicate on the basis of the constitutional legal status created by the CT and the legislator (Gonera, Łętowska, 2008, p. 13). However, there is a risk that this solution could lead to lengthy proceedings and complaints related to the length of the proceedings.

Second, the effects of rulings with a “deferral clause” are determined within the framework of judicial decisions. For this reason, it is worth considering the idea of amending Article 190(3) of the Constitution. According to Janusz Trzcinski, it is possible to eliminate the possibility of postponing the expiry of binding force of unconstitutional regulations or introduce regulations determining whether courts should apply unconstitutional regulations during the deferral period into the constitution regulations determining whether courts should apply unconstitutional regulations during the deferral period. In addition, it is worth determining whether the deferral clause prevents the resumption of proceedings pursuant to Article 190(4) of the Constitution after the deferral period specified in the Constitutional Tribunal’s decision (Trzcinski, 2005, p. 99). In the author’s opinion, due to the protection of the important constitutional values adhered to by the CT when applying the “deferral clause”, a better solution is to clarify constitutional regulations or complete provisions of the Act on the organization and procedure before the Constitutional Tribunal rather than eliminate the possibility of issuing the “deferral clause” at all.

Third, if the modification of Article 190(3) of the Constitution in terms of determining the effects of all rulings with the clause would prove impossible to apply, it can be limited only to the issue of the obligation to apply unconstitutional regulations during the deferral period by the court that asked the legal question. As Monika Florczak-Wątor rightly claims, the appropriate solution is to refer to Austrian models<sup>3</sup>. This modification would consist in supplementing the institution of deferral of the loss of binding force of the unconstitutional regulation with a provision indicating that in the case in which a legal question was asked, the unconstitutional regulation is not applied during the deferral period (Florczak, 2003, p. 59).

<sup>3</sup> Article 139(6) of the Constitution of Austria of 1920:

„(6) If an **ordinance** was voided because it was contrary to law or if the Constitutional Court, in accordance with Paragraph 4, has declared that an ordinance is contrary to the law, then all courts and administrative authorities are bound by the decision of the Constitutional Court. However, except for the pending case, the ordinance is to be further applied, to cases involving conditions (*Tatbestände*) which were realized before the voidance, unless the Constitutional Court declares otherwise in its voiding decision. If the Constitutional Court in its voiding decision has set a time limit, in accordance with Paragraph 5, then the ordinance is to be applied to all cases which were realized before the expiration of this time limit, **with the exception of pending cases** (*Anlassfall*)”.

Article 140(7) of the Constitution of Austria of 1920:

“(7) If a **law** was voided because of unconstitutionality, or if the Constitutional Court has declared, in accordance with Paragraph 4, that a law was unconstitutional, then all courts and administrative authorities are bound by the declaration. However, the law is to continue to be applied to situations which existed before the voidance, with the exception of the pending case, insofar as the Constitutional Court does not declare otherwise in its voiding decision. If the Constitutional Court in its voiding decision has set a time period, in accordance with Paragraph 5, then the law is to be applied to all situations realized before the expiration of this time period, **with the exception of the pending case**”.

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## **Polish Constitutional Tribunal Judgments with “Deferral Clause” and Their Application by Polish Courts**

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S u m m a r y

The Polish Constitutional Tribunal may specify a different date for the loss of a normative act’s validity than the date of the judgment’s publication. This period cannot be longer than 18 months in relation to a statute, or 12 months in relation to other normative acts. Polish Constitutional Tribunal judgments with a “deferral clause” confirm that a legal regulation is unconstitutional but still has binding force. This situation creates numerous problems in terms of applying the law.

The main aim of this paper is to present the application of unconstitutional provisions over the course of deferral of the loss of their binding force. This text also presents the opinions of the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court on this issue.

## **Lenkijos Konstitucinio teismo nutarimai su atidėjimo nuostata ir jų taikymas Lenkijos teismuose**

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S a n t r a u k a

Lenkijos Konstitucinis teismas gali nustatyti kitą norminio teisės akto teisinės galios praradimo datą nei nutarimo paskelbimo dieną. Toks terminas negali viršyti 18 mėnesių, kai priimtas įstatymas, ir 12 mėnesių – priėmus kitą norminį teisės aktą. Lenkijos Konstitucinio teismo nutarimai su atidėjimo nuostata patvirtina, kad nagrinėjama teisės nuostata yra nekonstitucinė, tačiau ji išlieka galiojanti. Toks atvejis sukelia daugelį teisės taikymo problemų.

Pagrindinis šio straipsnio tikslas – pristatyti atvejus, kai tam tikrą laiką buvo taikomi nekonstituciniai įstatymai, dėl atidėjimo nuostatos nepraradę privalomosios galios. Straipsnyje taip pat pristatoma Konstitucinio teismo, Aukščiausiojo teismo ir Vyriausiojo administracinio teismo pozicija šiuo klausimu.